No. 86-33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CSX CORPORATION (Formerly Chessie System, Inc.),

Petitioner,

v.

OGLEBAY NORTON COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The following question presented for review is an important and recurring issue of maritime law on which the Circuit Courts are in conflict:

Are this Court's prior decisions concerning a shipowner's indemnity rights against a stevedore or wharfinger[1] meant to permit a shipowner to obtain full indemnity for a seaman's accidental death even where (a) the shipowner was found to be three times more at fault than the wharfinger; and (b) the shipowner was the party best able to have prevented the accident?

[1] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Chesapeake & Ohio Railway Company,[2] prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit. The Court of Appeals reversed the United States Magistrate's ruling that Petitioner had no duty to indemnify Respondent, Oglebay Norton Company. Acknowledging decisions in other circuits to the contrary, the Sixth Circuit held that, under this Court's decisions in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and its progeny, a shipowner found

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[2] The named defendant in this action is CSX Corporation (formerly Chessie System, Inc.). At trial, the Magistrate granted a defense motion to substitute the C & O, the actual owner of the dock in question, as the proper defendant in lieu of CSX Corporation, a parent company. No issue regarding that ruling was raised on appeal.

by the Magistrate to be 75 percent at fault in the death of its seaman was nevertheless entitled to complete indemnity for payment of a wrongful death claim from a wharfinger found to be only 25 percent at fault because the shipowner's wrongful conduct did not prevent or hamper the wharfinger in fulfilling its duty to provide a safe berth.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 788 F.2d 361 (6th Cir. 1986), and printed in the Appendix hereto (App. 1-14). The United States Magistrate's unpublished Memorandum Order denying Respondent's indemnity claim and the subsequent unpublished Memorandum Order amending the judgment to allow Respondent's claim for contribution are printed in the Appendix hereto (App. 15-29).

JURISDICTION

The Opinion and Judgment of the Sixth Circuit Court of Appeals was entered on April 14, 1986. This Petition is timely filed within 90 days of that date, 28 U.S.C. §2101(c). Federal jurisdiction is claimed under 28 U.S.C. §1333(1). The statutory provision granting jurisdiction to this Court is contained in 28 U.S.C. §1254(1) as follows:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

This case arises out of the death of seaman Ralph Beckman (Beckman) when he fell between the steamship Sylvania, owned by Respondent Oglebay Norton Company (Oglebay) and a dock owned by the Chesapeake and Ohio Railway Company ("C & O") while attempting a night mooring of the Sylvania during an electrical power blackout. The shipowner Oglebay settled Beckman's wrongful death claim arising out of the accident, and sued the wharfinger C & O for indemnity or contribution. The United States Magistrate, as the trier of fact, found that Oglebay was three times more at fault than the C & O. The facts on which the Magistrate's ruling was based (which were not set aside by the Sixth Circuit) are as follows (App. 16-19):

Severe Weather Blacked Out The Dock Area

On April 4, 1980, the steamship Sylvania left Monroe, Michigan bound for the C & O Docks at Oregon, Ohio. The C & O was expecting the Sylvania, and knew her approximate time of arrival. During the late afternoon, a violent storm passed through the Oregon area, disrupting electrical power to the dock. The C & O, which had never before experienced such a blackout, tried but was unable to restore the power.

Mooring Of The Sylvania At The C & O Dock

The lack of lighting at the C & O dock was apparent to those on board the Sylvania, and the ship could have anchored until lighting was restored, or itself provided lighting during mooring operations. Nevertheless, the ship's master, Captain Scott, ignored these alternatives and proceeded to try to dock the ship in the darkened

conditions. Furthermore, Captain Scott, who had extensive experience docking at the C & O facility, knew that landing would present particular hazards to people walking on the dock because it was a concrete structure; it had no fenders to provide space between the dock and mooring ships; and it had no openings at water level to enable a person in the water to avoid being caught between the dock and the ship.

As part of the mooring procedure, decedent Beckman and another seaman were swung to the dock to attach lines from the vessel to the pier. When Beckman first landed, his path was brightly illuminated by a floodlight on the Sylvania. However, as the ship neared the dock, the Sylvania cast a shadow onto Beckman's path. Because the light was not manned, it did not move with him, and the area was not illuminated. Beckman slipped and fell between the dock and the Sylvania. Captain Scott was unable to stop the Sylvania, and Beckman was killed instantly when he was crushed between the dock and the vessel. There was evidence that the dock was wet from the storm and that there was some coal dust on the dock from a nearby coal loading machine.

The Magistrate Found That The Shipowner Was Best Able To Prevent The Loss, And Accordingly, Was Not Entitled To Indemnity

The Magistrate found that Captain Scott knew or had reason to know that the risk to Beckman would have been reduced if adequate lighting were provided, and further that Captain Scott had the ability to provide such lighting by:

1) manning the ship's floodlight;

2) making certain that Beckman had his flashlight;

3) landing additional seamen to assist in the mooring; or

4) requesting assistance from C & O employees.

The Magistrate found that Beckman's death would not have occurred if his path had been properly lighted, and made the following specific findings on the issue of liability:

> "As Captain of the Sylvania and superior officer of its crew, Captain Scott had the authority and ability to obtain ample illumination; he had the responsibility for accomplishing a safe landing; in view of his position and authority he was more able to reduce or avoid the apparent dangers than either the defendant or any of its employees." (App. 18.)
>
> "Although the C & O permitted a potentially hazardous condition to exist on the dock, by neither sweeping the coal nor providing illumination, the latent hazard became active as a result of Captain Scott's failure to anticipate, respond to, and avoid the risks which confronted Beckman as he walked in darkness on the dock; Beckman's death would not have occurred but for Captain Scott's inaction." (App. 18-19.)

The Magistrate further concluded, as a matter of law, that the C & O breached its warranty to provide a safe dock. However, after considering the rationale of this Court's decisions in *Ryan*, *Weyerhaeuser*, and *Italia Societa* he ruled that liability should fall on the shipowner, who was best situated to adopt preventive measures and reduce the likelihood of injury (App. 25). The Magistrate reasoned that the policy of protecting seamen from injury was best served by placing the loss on the party which could have prevented it, stating:

> "There appear to be certain cross-currents at work in these [Supreme Court] decisions. On the one hand, one can find rather clear language that a shipowner's own negligence does not bar its indemnity claim

where the other party has been found to have breached its warranty of safe conditions, causing injury to a seaman and pecuniary loss to the operator of the vessel. On the other hand, the rationale behind this approach is for loss to follow cause, with the ultimate purpose of protecting seamen from injury or death.

In my opinion, it is proper in this case to look beyond the Supreme Court's language in *Ryan* and *Weyerhaeuser*, and to allocate the loss in this case on the basis of the rationale to be served by indemnification actions in these kinds of cases.

* * *

Once the dispute about the proper standard is resolved, determination of the particular issues in this case is fairly straight-forward. I have found that but for Captain Scott's inaction, Beckman's death would not have occurred. Here, as in *Western Tankers, supra*, the Captain, 'as plaintiff's agent in charge, was best situated to adopt preventive measures and thereby reduce the likelihood of injury to the crew from the dangers caused by the unsafe berth.' 387 F.Supp. at 491. Here, as in that case, the Captain could have avoided the dangerous conditions altogether by not attempting to tie up in the darkness; or, having elected to proceed with landing, he could have prevented the likelihood of personal injury by ensuring that adequate lighting was made available. Like the Court in *Western Tankers*,

> 'I find, therefore, that the [vessel] failed to take the necessary preventive measures to reduce the likelihood of injury to the crew from the dangers of the unsafe [wharf] and conclude that plaintiff was sufficiently negligent to preclude it from recovery of indemnity from defendant. *Id.*" (App. 23-26.)

The Magistrate therefore denied Oglebay's claim for indemnity, but subsequently granted its contribution claim, finding that the C & O was 25 percent at fault for Beckman's death.

The Court Of Appeals Ruled That, Even Under The Facts As Found By The Magistrate, The Shipowner Was Entitled To Indemnity As A Matter Of Law

The Sixth Circuit Court of Appeals reversed the Magistrate's no indemnity ruling, holding as follows:

> "In this circuit, 'conduct sufficient to preclude recovery' is 'conduct which prevented or seriously hampered a contractor's performance of its duty in acdance with its warranty' of workmanlike performance." (788 F.2d at 366; App. 9.)

Accordingly, despite the fact that Oglebay, through its master, was found to be three times more at fault than the C & O because Oglebay was in control of the mooring operation and more able to reduce or avoid the apparent danger, the Court ruled that Oglebay was entitled to complete indemnity because it did not "prevent or hamper" the C & O in performing its duty to provide a reasonably safe dock. (788 F.2d at 367; App. 12.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE FEDERAL COURTS ARE IN PATENT CONFLICT AND DISAGREEMENT AS TO THE INTERPRETATION OF THIS COURT'S DECISIONS ON A SHIPOWNER'S INDEMNITY RIGHTS.

A. Decisions In *Ryan* And Its Progeny.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), this Court was asked to decide whether a shipowner found liable for injuries to a longshoreman working on its vessel had a right of indemnity as against the longshoreman's employer, whose negli-

gent stowage of the cargo had caused the longshoreman's injuries. The *Ryan* Court ruled that such a suit was, in essence, a contract action for breach of the stevedoring company's warranty to stow the cargo properly and safely. (350 U.S. at 133.) Accordingly, the shipowner was found to be entitled to recover damages arising from the breach (350 U.S. at 130), and this Court further held that the shipowner's failure to itself discover and correct the breach was not a defense. (350 U.S. at 134-35.)

Subsequently, in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), this Court made it clear that the shipowner was not entitled to indemnity under all circumstances. In *Weyerhaeuser*, a longshoreman was injured while working on a docked vessel when a piece of wood fell from a temporary shelter constructed several days earlier by his employer. The vessel had been to sea in the interim and it was customary for the shipowner to remove such a structure because it was a hazard in the winds at sea, but it had not done so in this instance. After a jury had returned a general verdict finding the shipowner negligent, the district court directed a verdict on the third party complaint for indemnity against the stevedoring company, and the court of appeals affirmed. This Court reversed, noting that the jury's general verdict against the shipowner could have been predicated on any of several theories, including: (1) failure to remove the shelter; (2) failure to warn the longshoreman of a dangerous condition known to the shipowner; or (3) failure to discover and correct the defect; and that the latter basis would not preclude an action for indemnity. (355 U.S. at 568.) However, the shipowner was not found to be entitled to indemnity as a matter of law; rather, the cause was remanded for a new trial on the following grounds:

> "If . . . [the stevedoring company] rendered a substandard performance [in providing unsafe equipment] which led to foreseeable liability of [the shipowner],

> the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues*—[the shipowner's] action in making the shelter on its ship available to [the stevedoring company's] employees in Boston although it apparently was unsafe, as well as [the stevedoring company's] continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions.*" 355 U.S. at 567. (Emphasis added.)

The rationale of these rulings was further clarified in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964), where a longshoreman was injured when a defective rope supplied by his employer and under the employer's control broke. The longshoreman recovered a judgment in state court against the shipowner in a suit alleging negligence and failure to provide a seaworthy vessel. The shipowner's subsequent indemnity action in federal district court was disallowed because the shipowner had failed to prove that the stevedoring company was negligent in providing the rope, since the defect was not apparent. The court of appeals affirmed that ruling, but this Court reversed, holding that the basis for imposing liability on the stevedoring company was not its negligence or lack thereof, but rather consideration of who was in a better position to avoid the accident because "liability should fall upon the party *best situated to adopt preventive measures and thereby reduce the likelihood of injury.*" (376 U.S. at 324. Emphasis added.)

In *Italia Societa*, since the defective equipment was under the exclusive supervision and control of the stevedore, the shipowner was powerless to minimize the risk, and was therefore entitled to indemnity regardless of the stevedore's lack of fault. This Court explained that its ruling furthered the objectives of maritime law "to minimize the hazards encountered by seamen, to compensate seamen

for the accidents that inevitably occur, and to minimize the likelihood of such accidents." (376 U.S. at 324.)

B. Conflict In Decisions After *Ryan* And Its Progeny.

In the years since this Court's decisions in *Ryan*, *Weyerhaeuser*, and *Italia Societa*, a sharp conflict has developed among courts of appeal and district courts as to what conduct on the part of a shipowner will preclude it from obtaining complete indemnity from stevedores and wharfingers.

The opinion of the Sixth Circuit in the instant case is illustrative of a line of cases which have focused on the *Ryan* decision's "warranty" language to develop a rule of thumb for determining a shipowner's indemnity rights. Those cases allow complete indemnity, regardless of the shipowner's fault in injuring one of its seamen, unless the shipowner's conduct "prevented or seriously hampered" the stevedore or wharfinger in fulfilling its "warranty" to perform proper stevedoring services or to provide a reasonably safe berth. According to these decisions, any other wrongful conduct on the shipowner's part, no matter how egregious, is irrelevant and should not be considered. Thus, according to the Sixth Circuit, the key inquiry involves "the weighing of fault with respect to the breach of the wharfinger's or stevedore's warranty of workmanlike service, rather than the weighing of fault with respect to the seaman's injury." (788 F.2d at 366; App. 9-10.) The same absolute rule has been adopted in the Fifth and Ninth Circuits. See, *e.g.*, *Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 590 F.2d 778, 782 (9th Cir. 1979) (indemnity precluded only where shipowner's conduct "effectively prevents the stevedore from satisfying its implied warranty of workmanlike service"), and *LeBlanc v. Two-R Drilling Co.*, 527 F.2d 1316, 1321 (5th Cir. 1976) (in shipowner's indemnity action, court must focus

on whether shipowner's conduct "seriously impeded or prevented Contractor from performing the job in a safe and workmanlike manner").

Other courts, like the Magistrate in the instant case, have looked instead to this Court's ruling in *Italia Societa*, and determined which of the parties was "best situated to adopt preventive measures and thereby reduce a likelihood of injury . . . for the dangers caused by the unsafe berth." (*Western Tankers Corp. v. United States*, 387 F. Supp. 487, 491 (S.D. N.Y. 1975).) This is the rule adopted by the Second Circuit. See, *e.g.*, *Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397, 401 (2d Cir. 1974); *Lopez v. Olendorf*, 545 F.2d 836, 839 (2d Cir. 1976), *cert. denied*, 431 U.S. 938 (1977); *Doca v. Marina Mercante Nicaraguense, S.A.*, 474 F.Supp. 751, 756 (S.D. N.Y. 1979), *aff'd in pertinent part, vacated in part*, 634 F.2d 30, 33-34 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Western Tankers Corp. v. United States*, 387 F.Supp. 487, 490-91 (S.D. N.Y. 1975); *In re Delphinus Maritima, S.A.*, 523 F.Supp. 583, 598 (S.D. N.Y. 1981). See also *Lowe v. S.C. Loveland Co.*, 1976 A.M.C. 829, 834 (E.D. Va. 1976) (rejecting the warranty doctrine as a "legal nicety [which would leave the shipowner] home free in the face of its own misfeasance"). Cf. *Smith & Kelly Co. v. S/S Concordia Tadj*, 718 F.2d 1022, 1025-26 (11th Cir. 1983) (proper rule requires consideration of which party was best able to prevent injury).

Both sides of the conflict ground their rulings on decisions of this Court. As the Magistrate in the instant case aptly noted, there are "cross-currents" in *Ryan*, *Weyerhaeuser*, and *Italia Societa* which have created a state of confusion in the law and have caused the allocation of liability for a seaman's injuries to turn in large measure on the circuit wherein the action is brought.

Accordingly, to give needed guidance to the federal bench and bar on this important and recurring issue of

maritime law, to resolve the conflict in the circuits, and to stop the growth of conflicting decisions, we urge this Court to grant the Writ of Certiorari sought herein.

CONCLUSION

To resolve the patent conflict among the federal courts as to the meaning of this Court's holdings in *Ryan* and its progeny, as well as to resolve the important issue of the circumstances under which a shipowner found to be at least partially at fault for an injury to its seaman may nevertheless obtain total indemnity from a wharfinger or stevedore, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals herein.

Respectfully submitted,

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APPENDIX

OGLEBAY NORTON COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

CSX CORPORATION,
Defendant-Appellee,
Cross-Appellant.

Nos. 85-3069, 85-3093.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 30, 1986.

Decided April 14, 1986.

Before KENNEDY and CONTIE, Circuit Judges, and GIBSON, District Judge.*

CONTIE, Circuit Judge.

This is a maritime action concerning liability for the death of a seaman. Oglebay Norton Company appeals from the magistrate's judgment, arguing that the magistrate erred as a matter of law in denying its claim for indemnity based on the defendant's breach of an implied warranty of workmanlike service; and, in the alternative, Oglebay argues that the magistrate's allocation of fault under a theory of contribution was clearly erroneous. Oglebay also argues that the magistrate abused his discretion in denying prejudgment interest and for failing to provide a rationale for his denial. The defendant, Chesa-

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* The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

peake and Ohio Railway Company (C & O),[1] argues on cross-appeal that the magistrate erred in amending C & O's judgment to permit Oglebay recovery under a theory of contribution. For the reasons set forth below, we hold that Oglebay is entitled to indemnity as a matter of law as well as prejudgment interest. Accordingly, the issue of contribution need not be addressed.

I.

On April 4, 1980, a violent storm passed through the Toledo-Oregon, Ohio region and caused a power outage at C & O's docks located in Oregon, Ohio. The steamer Sylvania, a 572-feet self-unloading carrier owned by Oglebay, was headed toward the C & O docks from Monroe, Michigan when the storm hit at about 5:00 p.m. Prior to the storm, Oglebay had received instructions from C & O to dock at the No. 3 coal dock. Attempts by Sylvania to contact C & O by radio after the storm were unsuccessful.

To reach the C & O docks, it was necessary to proceed down the Maumee Channel.[2] The Sylvania had been navigating the Maumee Channel for about one and one half hours when it received instructions from the C & O, via the Coast Guard, at about 7:30 p.m. to dock at the No. 2 coal dock rather than the No. 3 coal dock.

Shortly thereafter, Captain Scott on the Sylvania observed that there were no lights at the C & O docks. The Sylvania entered the No. 2 coal dock slip at about 7:40 p.m. with her lights on. Although it was dusk, it was not yet completely dark. The C & O was expecting her,

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[1] Oglebay's complaint was filed against CSX Corporation (formerly Chessie System, Inc.), the parent corporation of C & O. The magistrate granted CSX's motion to substitute C & O, the actual owner of the dock.

[2] The water outside the channel is too shallow for this size boat. The channel itself is only 500 feet wide, making it impossible to reverse the course of the Sylvania without entering a side channel or dock.

and was aware of the approximate arrival time. The C & O's electricians had been unable to restore power to the dock and the dock was not equipped with an emergency lighting system. The only lights provided, therefore, were the lights on the steamer Sylvania.

The No. 2 coal dock has a two-tier concrete design. The upper tier is the main dock. The lower tier is only three feet wide, and is approximately three feet below the upper tier. There are no ladders or hand rails between the two tiers. The mooring spiles are on the lower level, requiring a seaman to step from the upper to the lower pier to moor the vessel. From the lower tier, the concrete dock drops straight down into the water. When a vessel docks, it is flush with the wall since the entire face of the dock is concrete. It is not equipped with fenders or similar items to keep the boat away from the wall, ladders to enable a person to climb out, or recesses to enable a person to swim under the dock. Since this wharf is equipped with a coal unloading machine, coal would often accumulate on the dock.

When the Sylvania docked, there was considerable coal spillage since the C & O employees had not swept the dock of coal. Further, the dock and coal remained wet and slippery from the storm. The C & O did not provide illumination for the boat, despite the opportunity to do so and the availability of flashlights and car lights. The dock had about 20 crew members on hand who were apparently not occupied because of the power failure.

As the Sylvania pulled up to the dock, two seamen, Ralph Beckman and Orville Hill, were lowered from the vessel to the upper tier of the dock. Captain Scott did not request the assistance of the C & O dock hands, and they did not volunteer assistance. Beckman was in charge of the forward mooring cables which he carried at the same speed as the moving vessel for approximately 60 feet before he had to step to the lower level. He was not carrying a flashlight, but the boat's floodlight had been lighting his way. However, as the boat drew in closer to

the dock, the lower level of the pier was darkened by a shadow, and no one was manning the floodlight in order to change its angle to light Beckman's way. As this was transpiring, there was no assistance from the C & O dock hands; Captain Scott did not request assistance, and none was volunteered.

Beckman was directed by another deck hand, Hosko, to attach the cable to a particular dock spile on the lower tier. Hosko testified that he and Beckman were able to identify spiles despite the inadequate lighting. As Beckman stepped to the lower level he slipped or tripped and fell into the water between the concrete dock face and the vessel. Hosko yelled a warning, but Captain Scott was unable to reverse the ship's direction despite the use of bow thrusters and the attempted use of safety blocks. Beckman was crushed between the boat and the dock and was killed instantly.

Beckman's personal representative brought a wrongful death claim against Oglebay under the Jones Act, 46 U.S.C. § 688. Oglebay tendered the defense of this claim to the C & O, but the C & O rejected the tender. The claim was settled for $50,000, and Oglebay incurred $9,857.40 in attorneys' fees in the process.[3] Thereafter, Oglebay instituted this action against C & O to recover the expenses. In its complaint Oglebay sought indemnity or contribution over against C & O but litigated its claim to the court only on the indemnification theory.

The case was referred to a magistrate. The parties consented to having the magistrate enter a binding judgment with direct appeal to the court of appeals. The magistrate first ruled, on September 28, 1984, that maritime rather than state law controlled the case, relying on *Sims v. Chesapeake & Ohio Railway Co.*, 520 F.2d 556 (6th Cir. 1975). The magistrate found that an "implied warranty of workmanlike performance" runs from a wharfinger to

[3] These amounts were stipulated as being reasonable by both parties.

a shipowner which allows a shipowner to seek indemnification, and that this warranty had been breached by the C & O. The magistrate held, however, that indemnification was inappropriate because Captain Scott was negligent in failing to provide adequate lighting or to anchor elsewhere until lighting was furnished, thereby proximately causing Beckman's death. He concluded that Scott was aware of the coal dock's dangers and was in a better position to avoid the injury than the wharfinger and his actions "precluded recovery" under the theory of indemnification. Since Oglebay had not argued its theory of contribution, the magistrate concluded that it was inappropriate to decide that issue.

Pursuant to Fed.R.Civ.P. 52(b) and 54(c) Oglebay moved to amend the judgment to include an award of contribution. The C & O opposed this motion, arguing that Oglebay had abandoned this claim and that the C & O would be prejudiced by the magistrate's consideration of it. The magistrate, however, ruled on December 14, 1984 that Oglebay had not abandoned its contribution claim, and that the C & O would not be prejudiced since no additional facts or evidentiary matters could, or would, have been offered by the C & O. He concluded that both parties were at fault and that applying a contribution theory would reduce the possibility of danger to other seamen. The magistrate held that Captain Scott was 75 percent to blame because he "was in charge, and it was he who should have foreseen danger and acted, either by commanding his own men, seeking assistance from the defendant's employees, or declining to dock." The C & O was held to be 25 percent at fault since its employees had not "lent a hand." The total award was $12,500, which did not include interest, costs or attorneys' fees.

II.

A.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the Supreme Court held that a stevedoring company, pur-

suant to a contract with the shipowner, had an implied warranty of workmanlike service to properly and safely stow cargo.[4] By the stevedore's failure to satisfy this warranty, the shipowner had a right to indemnification from the stevedoring company for loss resulting therefrom.[5]

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[4] A contractual relationship, however, is not considered an essential element to imply this warranty. *See Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 81 S.Ct. 200, 5 L.Ed.2d 169 (1960).

[5] A seaman who was employed by the stevedoring company had been injured while on the vessel. He therefore sued the owner of the vessel. By paying the seaman for his personal injuries, the ship sustained a loss which it was then able to recover from the stevedoring company. The action by the seaman against the vessel, brought under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, was based upon the warranty of seaworthiness. Under *Ryan*, the employee was circuitously being reimbursed for his injuries by his employer because of the shipowner's remedy against the stevedoring company under the warranty of workmanlike service. The 1972 Amendments to the Longshoremen's Act provide that an injured employee may sue a vessel for its negligence, but the vessel may not recover this amount from the employer. These amendments, therefore, overrule *Ryan*,

> insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See H.R.Rep. No. 92-1441, pp. 4-8 (1972); S.Rep. No. 92-1125, pp. 8-12 (1972).

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 113 n. 6, 94 S.Ct. 2174, 2178 n. 6, 40 L.Ed.2d 694 (1974). However, the action in the instant case was brought under the Jones Act, and the individual injured was not an employee of the dock owner. There is no indication that the warranty of workmanlike service no longer exists, or that indemnity actions have been barred. Nor does the appellee in the instant case argue that this doctrine is no longer viable. Therefore, it appears that *Ryan* and its progeny continue to be valid precedent in this case. *But see Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397, 403 (2d Cir. 1974) (since contribution is permitted in noncollision cases, the *Ryan* rule should give way to a more equitable sharing of loss); *Smith & Kelly Co. v. S/S Concordia Tadj*, 718 F.2d 1022, 1025-28 (11th Cir. 1983) (refusal to expand *Ryan*).

Since suing on the warranty is a contract action, the "concepts of primary and secondary or active and passive" negligence are irrelevant. *Id.* at 133, 76 S.Ct. at 237. Even though recovery may turn on the company's standard of performance, the action remains a contract, not tort, action. *Id.* at 133-34, 76 S.Ct. at 237. Further, the "shipowner's failure to discover and correct the contractor's own breach of warranty" is not a defense to indemnification. *Id.* at 134-35, 76 S.Ct. at 237-38.

In later cases, the Court has held that the warranty of workmanlike service can be breached and indemnity awarded even if the contractor has not acted negligently when furnishing latently defective equipment. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964). Since the stevedoring company provided the necessary equipment and had control over the loading and unloading of the ship and the supervision of such operations, the Court in *Italia Societa* noted that the stevedoring company "was in a far better position than the shipowner to avoid the accident." *Id.* at 323, 84 S.Ct. at 753. The Court stated that:

> [L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

Id. at 324. *See also Henry v. A/S Ocean*, 512 F.2d 401, 406 (2d Cir. 1975) (the doctrine of indemnity "serves to allocate risks among those segments of the enterprise best able to minimize the particular risk involved"). The Court also emphasized that the special rules governing maritime law were "designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents." *Italia Societa*, 376 U.S. at 324, 84 S.Ct. at 754.

The warranty of workmanlike performance also runs from a wharfinger, or dock owner, to a shipowner. *Sims*

v. Chesapeake & Ohio Railway Co., 520 F.2d 556, 561 (6th Cir. 1975); *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 354 F.2d 476 (4th Cir. 1966); *Ammesmaki v. Interlake Steamship Co.*, 342 F.2d 627 (7th Cir. 1965); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp. 913 (E.D. La. 1977), *aff'd*, 608 F.2d 522 (5th Cir. 1979); *Western Tankers Corp. v. United States*, 387 F.Supp. 487 (S.D.N.Y. 1975). In *Sims*, this court stated that:

> The nature of the services performed by the wharfinger determines the extent of this warranty. . . . The implied warranties of a wharfinger relate to the conditions of berths and the removal of dangerous obstructions or giving notice of their existence to vessels about to use the berths. . . . A wharfinger also owes a duty to furnish a safe means of egress and ingress to berthed ships.

520 F.2d at 561.[6] In *Ammesmaki*, 342 F.2d 627, 631 (7th Cir. 1965), the wharfinger was held liable to indemnify the shipowner for an injury occurring on the dock since the wharfinger had breached its warranty "to maintain its dock in a reasonably safe condition."[7]

The magistrate found that the C & O had breached its warranty of workmanlike performance. In reaching this result, the magistrate applied the correct legal standard

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[6] The court held that the warranty did not extend to all property owned by the wharfinger. Since the injury in *Sims* took place in a parking lot away from the pier, the warranty was not implicated.

[7] Although not a warranty case, the Fourth Circuit in *Medomsley*, set out a wharfinger's duty as follows:

> It is well settled, of course, that a wharfinger is under a duty to exercise reasonable care to furnish a safe berth and to warn a ship of any unexpected hazard or deficiency known to the wharfinger, or which, in the exercise of reasonable care, he should have known.

354 F.2d at 480.

enunciated in *Sims*. Therefore, his finding of breach can be set aside only if clearly erroneous. Fed.R.Civ.P. 52(b). Neither party contends that the magistrate erred in this finding, and a quick review of the record reveals the reasonableness of the magistrate's conclusion: the dock was strewn with wet coal, no emergency lighting was provided, the two-tier dock style and its sheer concrete face were inherently dangerous which was complicated by the lack of fendering, recesses or ladders.[8]

Having found that the wharfinger breached its warranty of workmanlike service which runs to a shipowner, indemnity may nonetheless be an inappropriate remedy. A shipowner is entitled to indemnity when a breach of the warranty of workmanlike performance results in loss, "*absent conduct on [the shipowner's] part sufficient to preclude recovery.*" *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S.Ct. 438, 440, 2 L.Ed.2d 491 (1958) (emphasis added). Negligent conduct on the part of a shipowner is not necessarily sufficient to preclude recovery, since the recovery should not turn on active, passive, primary or secondary negligence." *Id.* at 568-69, 78 S.Ct. at 441-42.

In this circuit "conduct sufficient to preclude recovery" is "conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty" of workmanlike service. *Turner v. Global Seas, Inc.*, 505 F.2d 751, 753 and 754 (6th Cir. 1974).[9] Although the appellees have rigorously argued that *Turner* does not stand for this proposition, we disagree. The key to

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[8] It should be noted that three seaman had been crushed in a similar fashion at the C & O docks on previous occasions, and the C & O docks are apparently one of the few docks on Lake Erie that fail to provide any of these safety features.

[9] In *Turner*, steel billets had been improperly loaded onto the vessel. The stevedoring companies sought to correct the problem, but the ship refused, insisting to set sail despite the deficiency. Therefore, the shipowner prevented the stevedores from performing within their warranty.

Turner is the weighing of fault with respect to the breach of the wharfinger's or stevedore's warranty of workmanlike service, rather than the weighing of fault with respect to the seaman's injury. Other circuits have similarly defined a shipowner's conduct which is "sufficient to preclude recovery." *See, e.g., Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 590 F.2d 778, 782 (9th Cir. 1979) (indemnity denied under *Weyerhaeuser* when shipowner's conduct "effectively prevents the stevedore from satisfying its implied warranty of workmanlike service");[10] *Henry v. A/S Ocean*, 512 F.2d 401, 407 (2d Cir. 1975) (recovery precluded "only where [the shipowner] prevented or seriously handicapped the stevedore in his effort to perform his duties"); *Le Blanc v. Two-R Drilling Co.*, 527 F.2d 1316, 1321 (5th Cir. 1976) (to deny recovery, focus on "whether conduct or circumstances of the condition for which Shipowner has a legal responsibility seriously impeded or prevented Contractor from performing the job in a safe and workmanlike manner").[11] *See also Commercial Union Insurance Co. v. M/V Bill Andrews*, 624 F.2d 643, 647 (5th Cir. 1980). *But see Western Tankers Corp. v. United States*, 387 F.Supp. 487, 491 (S.D.N.Y. 1975) (a vessel's negligence is sufficient to preclude indemnity if it is "best situated to adopt preventive measures

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[10] In *Hanseatische* the Ninth Circuit stated that indemnity was owed to a shipowner if the shipowner does not prevent or seriously handicap the stevedore's fulfillment of its warranty; and even if the shipowner does handicap the stevedore, indemnity is not necessarily precluded. 590 F.2d at 783. The court focused primarily on whether the shipowner sought to recover for "*foreseeable* harms resulting from the breach." *Id.* at 781 (emphasis added). Since attorneys' fees and expenses were foreseeably incurred as a result of the stevedore's breach, these were also recoverable. *Id.* at 784.

[11] In *Le Blanc*, the lower court erred by focusing on the shipowner's control over, and responsibility for, the equipment and operations, rather than focusing on the warranty for workmanlike performance. 527 F.2d at 1329. Similarly, in this case, the magistrate focused on the Captain's control over the seaman rather than the wharfinger's control over the dock.

and thereby reduce a likelihood of injury . . . for the dangers caused by the unsafe berth"); *Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397, 402 (2d Cir. 1974) (whoever is best situated to adopt measures to reduce likelihood of injury bears the loss).[12]

In the instant case, the magistrate focused on the relative fault of the parties rather than determining whether Captain Scott's conduct prevented or seriously hampered the C & O from performing in a workmanlike manner. The magistrate concluded that Captain Scott "was more able to reduce or avoid the apparent dangers," and held that under *Italia Societa*, "liabilities should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." The magistrate noted that in *Turner* this court endorsed the jury's right to weigh "the substantiality of the fault of the shipowner against the breach of warranty to determine whether the shipowner's conduct was 'sufficient to preclude indemnity,' " *quoting Turner*, 505 F.2d at 756. The magistrate then concluded that "a claim for indemnity can be barred where the claimant-shipowner's own conduct proximately caused the loss which it suffered," and that "[b]y placing the loss on the party which could have prevented the loss, the policy of protecting crew members from risk of injury is furthered."

We believe that the test which the magistrate enunciated converts this contract action into a tort action by weighing comparative fault, precisely what *Ryan* and *Weyerhaeuser* cautioned against. Further, it ignores the nature of the wharfinger's warranty to maintain a safe berth and the wharfinger's control over the dock. Al-

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[12] In *Hurdich*, the court of appeals decided who was best able to reduce the likelihood of injury by determining who had more control over the area where the injury occurred, rather than who had control over the person who was injured. These cases are inconsistent with the law in this circuit only to the extent that they fail to focus on how the shipowner's conduct affects the wharfinger's or stevedore's ability to perform within its warranty.

though Oglebay was in control of Beckman and the mooring, the C & O was under an obligation as to the shipowner to cure the dangerous conditions of the dock. The magistrate did state that Captain Scott " 'prevented the workmanlike performance' in the context of this case when he failed to act in a manner which would have made safe docking possible." However, his conclusion is clearly erroneous since there is no evidence that Captain Scott prevented the C & O from sweeping the coal, providing emergency lighting, or adding safety features to make the dock less dangerous. Although Captain Scott could have avoided the danger by refusing to dock, he did not prevent or hamper the wharfinger's "performance of its duty in accordance with its warranty" of workmanlike service. In the absence of such a showing, a shipowner's negligence does not prevent recovery under this theory of indemnity.

Therefore, we conclude that Oglebay is entitled to indemnity under the standards set forth in *Ryan, Weyerhaeuser* and *Turner.*[13]

B.

Oglebay sought, but did not receive, prejudgment interest. The magistrate did not address this issue, but simply awarded $12,500, or 25 percent of the $50,000 settlement.

In a seaman's action to recover for personal injury or death, the general rule is that interest is awarded "from

[13] The C & O portrays this as an absurd result since a 75 percent negligent shipowner would be allowed to recover from a 25 percent negligent wharfinger. However, the magistrate's calculation of fault cannot be removed from his understanding of *Turner.* He calculated C & O's fault by its failure to offer aid to Captain Scott rather than the dangerous nature of the dock. Further, as previously noted, comparative fault has no meaning in an indemnity action. As long as the shipowner's actions do not prevent the wharfinger from performing within its warranty, then the shipowner can be indemnified.

the date that the damages have been judicially determined," and not prejudgment interest from the date of injury. *Cleveland Tankers, Inc. v. Tierney,* 169 F.2d 622, 626 (6th Cir. 1948). *See also Petition of United States Steel Corp.,* 436 F.2d 1256 (6th Cir. 1970), *cert. denied,* 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 720 (1971). In contrast, where recovery for property damage is sought in an admiralty case, prejudgment interest is usually awarded "as compensation for the use of funds to which the claimant was rightfully entitled." *Noritake Co. v. M/V Hellenic Champion,* 627 F.2d 724, 728 (5th Cir. 1980). In such cases, "[d]iscretion to deny prejudgment interest is created only when there are 'peculiar circumstances' that would make it inequitable for the losing party to be forced to pay prejudgment interest." *Id.* "Peculiar circumstances" is a broad exception, and it is a factual determination governed by the clearly erroneous standard. *Id.* at 729. If the trial judge does not make a finding of "peculiar circumstances," the appeals court may make such an inference particularly "when the record clearly discloses peculiar circumstances. . . ." *Id.* However, if peculiar circumstances do not exist from the face of the record, the district court can be reversed for failing to award prejudgment interest. In such a case, the court of appeals has the power to modify the award, or remand to the trial judge for a calculation of interest. *Id. See also Todd Shipyards Corp. v. Turbine Service, Inc.,* 674 F.2d 401, 415 (5th Cir.), *cert. denied,* 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982); *Mid-American Transportation Co. v. Cargo Carriers, Inc.,* 480 F.2d 1071, 1074 (8th Cir. 1973).

We believe that an admiralty indemnity claim is more analogous to a property damage claim since the amount at issue has been liquidated. Under such circumstances, the only question to be determined at trial is which party should bear the loss. If it is determined that a third party was obligated to pay, that individual should be required to reimburse the party who carried its burden absent peculiar circumstances. *See, e.g., N.M. Paterson &*

Sons, Ltd. v. Nicholson Cleveland Terminal Co., 323 F. Supp. 913 (N.D. Ohio 1971) (prejudgment interest awarded in indemnity case measured from date of shipowner's settlement payment). Since the magistrate did not articulate any reason for denying interest, and no peculiar circumstances are apparent from the record, interest is awarded from the date that Oglebay settled Beckman's wrongful death claim.

Accordingly, the magistrate's decision on the indemnity claim is REVERSED. The appellant is entitled to indemnity for the $50,000 wrongful death settlement and prejudgment interest from the date of settlement is awarded in favor of Oglebay. Further, since the magistrate did not state any reasons for denying attorneys' fees, we find that Oglebay is entitled to the $9,857.40 in attorneys' fees that was stipulated to as being reasonable. *See Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 590 F.2d 778, 784 (9th Cir. 1979); *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 730-31 n. 5 (5th Cir. 1980); *N.M. Paterson & Sons, Ltd. v. Nicholson Cleveland Terminal Co.*, 323 F.Supp. 913, 916 (N.D. Ohio 1971).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[C 82-208 — Filed September 28, 1984]

Oglebay Norton Company,

Plaintiff,

v.

CSX Corporation,
[formerly Chessie System, Inc.],

Defendant.

MEMORANDUM & ORDER

This is an action brought by the owner of a vessel, the Sylvania, against the owner and operator of coal docks in Toledo, Ohio, the CSX Corporation (commonly known and referred to in the record and herein as the C&O). The parties have consented to entry of judgment by the undersigned, with appeal to the Sixth Circuit. Following a nonjury trial and the submission of post-trial briefs, this cause is decisional. For the reasons which follow, judgment shall be entered for the defendant. This Memorandum and Order states my findings of fact and conclusions of law in support of that judgment.

On April 14, 1980, a late afternoon storm caused a loss of power at the defendant's docks. There was still no power by 8:00 p.m. when the plaintiff's vessel, the Sylvania, arrived. As the Sylvania approached, there was no lighting available, except for lights on the vessel.

As part of normal landing procedures, two seamen were swung from the ship to the dock; their duty was to at-

tach lines from the vessel to the pier. One of these seamen, Ralph Beckman, walked in the same direction as the movement of the ship (southerly).

When Beckman first landed, the area which he was traversing was brightly lit by a "bridge wing" floodlight. However, as he continued walking, that light no longer illumined the area. At one point in the procedure, Beckman was required to step from the upper level of the dock to the lower level, where the dock spile (for attaching the line) was located. Beckman slipped, falling off the dock. The Sylvania's momentum could not be deflected, though her Captain, Robert Scott, used bow thrusters in an effort to head the ship away from the dock. Beckman was crushed between the vessel and dock and killed instantly.

Thereafter, a Jones Act action was brought against the plaintiff in the instant case by Beckman's representative. Plaintiff tendered defense of that claim to the C&O, which declined to participate in the defense. In time, the claim against the plaintiff was settled for $50,000.

This action is brought by the plaintiff for indemnity or contribution against the defendant. Some facts and most legal principles are in dispute.

A.

Factual Findings

1. The dock on which the accident occurred is of unique design, and is potentially hazardous under the conditions which existed at the time.

2. As a result of the design of the dock, a seaman engaged in mooring a docking vessel must step down from one level to the next while carrying the landing line.

3. The dock's vertical wall is sheer concrete; there are no fenders or other obstructions affixed to the dock to provide space between mooring ships and the dock; nor are there openings at water level in the dock wall to enable a person in the water to avoid being injured or crushed.

4. Coal spillage was located in the area being traversed by Beckman at the time of the incident; the latent hazard of slipping on the spillage was increased by the fact that it and the dock were wet from the earlier rainstorm.

5. The fact and time of the Sylvania's expected arrival at the dock were known to the C&O.

6. Through no fault of the defendant, regular power to light the dock was unavailable; efforts to restore power had been undertaken, but were unsuccessful.

7. Alternative means of illuminating the dock area were available to the C&O; these included hand-held flashlights and lights from motor vehicles; no effort was made by the C&O to employ such alternate methods of illumination before the Sylvania's arrival and the accident.

8. The C&O was aware from prior experience that coal would wash from the coal machines, located about eight feet from the dock edge, onto the dock surface in front of the machines.

9. Sufficient coal was on the dock surface to create a danger of slipping; the C&O neglected, however, to have the area swept clean, though such efforts would have reduced the amount of coal on the dock, and, as well the danger of slipping.

10. No similar loss of power on the docks had ever been experienced.

11. Captain Scott, the Sylvania's master, had extensive experience with landing at the defendant's docks; he never previously had done so in conditions of darkness similar to those encountered on April 4, 1980.

12. The darkened conditions at the docks were apparent from a sufficient distance to enable the Sylvania to either anchor until lighting was available, or to conduct the landing operation with lighting provided by the ship or other lighting sources.

13. These other sources could have included flashlights held by Beckman, other seamen, or the C&O employees on the dock.

14. Captain Scott had the ability to make certain that Beckman had his flashlight before landing him; likewise, Captain Scott had the ability to have the bridge wing light manned and operated in a manner to increase the illumination of Beckman's path; also, Captain Scott could have landed additional men with lights sufficient to provide illumination.

15. Captain Scott knew, or, in light of his experience with the C&O docks, had ample reason to know, that landing his vessel at that time and location presented particular hazards to persons walking on the dock.

16. Captain Scott knew, or, in light of his experience, had ample reason to know, that the risks would have been substantially reduced if the area were to be illuminated.

17. Despite his knowledge of, or reason to know the risks of docking at the coal dock in darkness, Captain Scott failed to make certain that Beckman had a flashlight, land additional seamen to assist, or man the bridge wing light; in addition, he failed to request assistance, after landing Beckman, from C&O employees present on the dock.

18. If adequate illumination had been provided to enable Beckman to see where he was walking and stepping, the accident would not have occurred.

19. Both the plaintiff, through Captain Scott, and the defendant, through its employees on the scene, had the ability to secure and provide adequate illumination to reduce the danger to Beckman as he performed his duties.

20. As Captain of the Sylvania and superior officer of its crew, Captain Scott had the authority and ability to obtain ample illumination; he had the responsibility for accomplishing a safe landing; in view of his position and authority he was more able to reduce or avoid the apparent dangers then either the defendant or any of its employees.

21. Although the C&O permitted a potentially hazardous condition to exist on the dock, by neither sweeping

the coal nor providing illumination, the latent hazard became active as a result of Captain Scott's failure to anticipate, respond to, and avoid the risks which confronted Beckman as he walked in darkness on the dock; Beckman's death would not have occurred but for Captain Scott's inaction.

B.

Conclusions of Law

This case presents several legal issues, most of which are vigorously contested between the parties; consequently, it is necessary to reach some initial general conclusions before making specific legal conclusions applicable to this particular case.

The principal threshold dispute relates to whether maritime or state law applies. The defendant claims that this lawsuit is governed by the law of the State of Ohio. The plaintiff, citing *Sims v. Chesapeake & Ohio Rwy.*, 520 F.2d 556 (6th Cir. 1975) (involving the same docks and vessel, but a different seaman), asserts that federal maritime law applies.

I agree with the plaintiff that *Sims* is in all pertinent respects indistinguishable from the instant case. There, as here, the shipowner sought indemnity for amounts paid by it after one of its crew members had been injured on C&O property after returning to the vessel from being ashore. Though the plaintiff's claim was rejected on the facts before the court, it clearly accepted and underscored the existence of "an implied warranty of workmanlike performance which runs from a wharfinger to a shipowner." *Id.* at 561. The court rejected the argument, similar to that made by the defendant in the instant case, that state law governed.

In light of such rejection, the defendant's claims in this case are without merit. In addition, the court in *Sims* spoke even more directly to the facts of this case when it stated, "A wharfinger owes a duty to furnish a safe means

of egress and ingress to berthed ships. . . [A] wharfinger should be held to warrant the safety of its property devoted to use as piers. . . . *Id.* The Sixth Circuit's position on the governing law is, therefore, not only unequivocal, it is expansive in terms of the scope of a dock owner's duty to indemnify a shipowner for injuries caused to crew members as a result of the conditions of its wharf and adjacent environs.

A second dispute about general principles relates to the consequences of the shipowner's own conduct (as attributed to it through its agent, Captain Scott) on its right to obtain indemnification. In the plaintiff's view, the role played by Captain Scott in the events leading up to Beckman's death, and the responsibility for that event which Captain Scott bears, are immaterial to its right to indemnification for the hazards which the defendant allowed to exist. Defendant, naturally, asserts that the Captain's conduct bars his employer's claim for recovery against the defendant.

Before reaching this issue and its application in this case, an initial question about the defendant's breach of warranty must be answered. If no breach occurred, then the case ends with a verdict for the defendant.

Such cannot, however, occur, in view of the C&O's responsibility for the latent hazard which it allowed to exist on its dock. Like the plaintiff's Captain, the C&O had the means at hand to provide adequate lighting, and thereby reduce or eliminate the danger to Beckman. It failed, however, to respond in the face of the foreseeable danger created by the dock's design, the presence of coal and moisture, and darkness. In light of those facts, I conclude that, as a matter of law, the C&O breached its warranty to the plaintiff that it would provide safe working conditions for the plaintiff's landing crew as they undertook the necessary and predictable task of tying the vessel to the dock.

Consequently, it is necessary to consider and determine the consequences of Captain Scott's conduct on the plain-

tiff's right to recover for the defendant's breach of warranty. That conduct, in my opinion, bars recovery, despite the defendant's breach of the warranty.

The disagreement between the parties on the general issue is understandable, in view of the fact that the leading cases on this question may be, and have been by the parties, cited for inconsistent propositions. When reviewed in toto, however, I am persuaded that the cases and their underlying rationale support a verdict for the defendant in this case.

The warranty doctrine, as it exists in this case, derives from the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In that case the Court held that a stevedoring company was liable to a shipowner for injuries caused to a crewman as a result of negligent performance of stevedoring services. The injury had occurred as a result of improper stowage of the load. The Court stated that, as between the stevedoring company and the shipowner, the stevedoring company could not defeat the shipowner's claim for indemnity on the basis that the shipowner had failed to discover and correct the stevedore's failure to have performed its work properly. *Id.* at 134.

Thereafter, the Supreme Court emphasized the contractual nature of the relationship between the shipowner and a stevedore in *Weyerhaueser S.S. Co. v. Nacirema Co.*, 355 U.S. 563 (1958). In that case injury had been caused because of the stevedoring company's failure to remove a temporary shelter before the vessel sailed from one port to another, contrary to customary and safe practice. The Court stated that the failure of the shipowner to have inspected or removed the shelter did not disqualify it from seeking indemnity from the stevedoring company after a verdict had been returned for the injured seaman on his claim against the shipowner.

Rather, the Court stated, if the stevedore "rendered a substandard performance which led to foreseeable liability" of the shipowner to the seaman, then the shipowner

"was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" *Id.* at 567 (emphasis supplied). The Court also stated, however, "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as "primary" or "secondary" negligence is inappropriate." *Id.* at 569 (dictum). The shipowner's claim having been dismissed on a directed verdict following the verdict in favor of the injured seaman, the case was remanded for trial on that claim.

The Supreme Court's third decision in this area also involved a claim by a shipowner against a stevedoring company. In that case, *Italia Societa per Azioni di Navigazone v. Oregon Stevedoring Company, Inc.*, 376 U.S. 315 (1964), the Court repeated its earlier observations that "recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary." *Id.* at 321. In that case, a rope had given way, causing the injuries; the Court held that the stevedoring company's ignorance about the latent defect did not relieve it of its obligation to provide safe equipment and perform in a same manner. Rather, its legal responsibility, the Court noted, was like that of a manufacturer or seller, who is required to sell products free from defects.

The rationale for this approach, according to the *Italia Societa* decision, was that "liability *should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury.* Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not." *Id.* at 324 (emphasis supplied). The Court expressed the policies which supported its conclusion that the party best able to prevent the loss should bear the loss as follows:

> [W]e deal here with a suit for indemnification based upon a maritime contract, . . . , in an area where rather special rules governing the obligations and lia-

> bilities of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the party whose default caused the injury, we think our decision today is in furtherance of these objectives.

Id.

There appear to be certain cross-currents at work in these decisions. On the one hand, one can find rather clear language that a shipowner's own negligence does not bar its indemnity claim where the other party has been found to have breached its warranty of safe conditions, causing injury to a seaman and pecuniary loss to the operator of the vessel. On the other hand, the rationale behind this approach is for loss to follow cause, with the ultimate purpose of protecting seamen from injury or death.

In my opinion, it is proper in this case to look beyond the Supreme Court's language in *Ryan* and *Weyerhaueser*, and to allocate the loss in this case on the basis of the rationale to be served by indemnification actions in these kinds of cases. Support for this approach appears with clarity in the Sixth Circuit's decision in *Turner v. Global Seas, Inc.*, 505 F.2d 751, 754 (6th Cir. 1974), in which the court stated that "a party to a contract [*i.e.*, plaintiff] cannot recover indemnification from another party [*i.e.*, defendant] for a breach which the first party caused or substantially helped to cause." The court noted the Supreme Court's qualification of the principle of indemnity in cases in which the "would-be indemnitee" is "guilty of conduct which precludes recovery." (*Id.* at 755 (*citing Weyerhaueser, supra*)).

In *Turner* the court appears to approve of cases "which have allowed the shipowner to recover on an indemnity claim against a stevedoring company in spite of the fact that the ship itself contributed to the injury by its unseaworthiness." *Id.* at 756. In such cases, the court noted, "the negligence of the shipowner" is "weighed against

that of the stevedoring company", with greater fault being found on the part of the stevedore. *Id.*

In *Turner*, the court upheld the denial of a shipowner's indemnification claim on the basis that its actions had prevented the safe execution by the stevedore of its duty to load the vessel properly. Though the court phrased its description of the shipowner's conduct in terms of substantially hampering the stevedoring firm's workmanlike performance of its duties, the court's opinion endorses the jury's implicit right to weigh "the substantiality of the fault of the shipowner against the breach of warranty to determine whether the shipowner's conduct was 'sufficient to preclude indemnity.' " *Id.*

I conclude, therefore, that despite the language of *Weyerhaueser*, a claim for indemnity can be barred where the claimant-shipowner's own conduct proximately caused the loss which it suffered. Upon examining the many authorities cited by the parties on this issue, I find those relied on by the defendant to be more persuasive, and more in line with the rationale upon which the Supreme Court has erected and expanded the indemnity principle. By placing the loss upon the party which could have prevented the loss, the policy of protecting crewmembers from risk of injury is furthered. See *Western Tankers Corp. v. United States*, 387 F. Supp. 487 (S.D. N.Y. 1975).

Indeed, I am not entirely persuaded, upon analysis, that my approach conflicts with that taken in many of the cases cited by the plaintiff. Thus, in *Hudson Waterways Corp. v. Coastal Marine Service, Inc.*, 436 F. Supp. 597, 601 (E.D. Tex. 1977), the court cites a three-part test to determine whether the shipowner is entitled to indemnification from the stevedore (or wharfinger, in the instant case):

> (1) Whether the warranty of workmanlike performance was breached; (2) whether that breach proximately caused the injury; and (3) whether the shipowner's conduct prevented the workmanlike performance.

In two respects, this test, when applied to this case, leads to a result favorable to the defendant. First, I have found that the proximate cause of Beckman's death was the inaction of Captain Scott. And second, that same inaction "prevented the workmanlike performance" in the context of this case when he failed to act in a manner which would have made safe docking possible. Just as the language of the cases has gone from that to stevedoring to wharfingering, so too defendants can respond to claims in terminology other than that of "workmanlike performance." The principle is the same: one who can avoid injuries should not recover for losses caused by his inaction. *Turner, supra,* 505 F.2d at 754.

I find, therefore, that the proposition urged by the defendant—that the shipowner's conduct can bar indemnification—to be more appropriate. And, I also conclude that, in any event, the cases upon which the plaintiff bases its response to the defendant's contention are, at least to some extent, distinguishable or supportive of the defendant's position.

Once the dispute about the proper standard is resolved, determination of the particular issues in this case is fairly straight-forward. I have found that but for Captain Scott's inaction, Beckman's death would not have occurred. Here, as in *Western Tankers, supra,* the Captain, "as plaintiff's agent in charge, was best situated to adopt preventive measures and thereby reduce the likelihood of injury to the crew from the dangers caused by the unsafe berth." 387 F. Supp. at 491. Here, as in that case, the Captain could have avoided the dangerous conditions altogether by not attempting to tie up in the darkness; or, having elected to proceed with landing, he could have prevented the likelihood of personal injury by ensuring that adequate lighting was made available. Like the court in *Western Tankers,* I

> find, therefore, that the [vessel] failed to take the necessary preventive measures to reduce the likelihood of injury to the crew from the dangers of the

> unsafe [wharf] and conclude that plaintiff was sufficiently negligent to preclude it from recovery of indemnity from defendant.

Id.

And I, likewise, conclude that, as a matter of law, for the reasons expressed above, the plaintiff is not entitled to indemnification from the defendant for the losses sustained in settling the claim by Beckman's representative. Judgment on the indemnification claim shall be, therefore, for the defendant.

In its complaint, as noted at the outset of this opinion, the plaintiff also claimed entitlement to contribution. The case was not presented on that theory, and neither evidence nor briefs were addressed to that claim. Though the issue of contribution arguably was raised in this action, it was not litigated. Consequently, I conclude, as did the Sixth Circuit in *Turner, supra*, that "[u]nder these circumstances, it would be inappropriate . . . to consider the interesting problems concerning contribution discussed in *Cooper Stevedoring Co. v. Fritz Kipke, Inc.*, 417 U.S. 106 (1974)."

For the foregoing reasons, it is

ORDERED THAT judgment be entered for the defendant and against the plaintiff.

The Clerk shall prepare an entry of judgment accordingly.

SO ORDERED.

/s/ _____
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[C 82-208 — Filed December 14, 1984]

Oglebay Norton Company,

Plaintiff,

v.

CSX Corporation,

Defendant.

MEMORANDUM & ORDER

This case involves a claim by the owner and operator of a Great Lakes vessel against the owner and operator of a coal dock. The parties consented to trial before and entry of judgment by the undersigned. At the conclusion of that trial, and following post-trial briefs, I determined that judgment should be entered in favor of the defendant and against the plaintiff.

In my original decision, I included several factual findings which showed that the defendant CSX Corporation (owner of the coal dock) had been negligent, and had failed to provide a safe wharf when the vessel was being docked. I also found, however, that the Captain of the vessel had been in a superior position at the time of the accident to prevent the accident and ensuing loss to his company, Oglebay Norton.

In light of these findings, and upon a survey of applicable legal principles, I concluded that, as a matter of law, the plaintiff was not entitled to obtain indemnification from the defendant for that loss.

In passing, I noted that the case had been submitted on an indemnification theory, although the plaintiff had also sought contribution. Not surprisingly, plaintiff has alertly interpreted that reference as an invitation to seek to have the judgment amended to recover some contribution from the defendant.

The defendant, equally predictably, opposes that request vigorously. It claims that the plaintiff, in effect, abandoned that claim when it failed to assert it either during or after the trial. In addition, the defendant claims that it will be prejudiced if consideration is given to the plaintiff's revitalized request for contribution.

I disagree with the defendant. I am not persuaded that there are any additional facts or evidentiary matters which could be offered by the defendant, or which would have been offered, had the plaintiff pursued its contribution claim with greater vigor during and after the trial. Nor do I deem the plaintiff to have abandoned that claim, though arguably I could find that it had done so through its lassitude on the topic.

The fundamental issue in this case is the safety of seamen. As my original tentative oral findings at the conclusion of the trial, and thereafter, as my formal findings of fact reflect, both parties were to blame for Seaman Beckman's death. Consequently, my original decision refused to allow the plaintiff to shift its loss, incurred when it settled with Beckman's estate, entirely to the defendant.

But that does not mean that, as a matter of equity, the defendant is or should be entitled to have the loss borne entirely by the plaintiff. If the defendant's employees had been attentive to the danger which confronted Beckman, and, in simple terms, if they had "lent a hand," Beckman's death would not have occurred. The fact of Captain Scott's greater culpability, as the officer in charge and responsible, cannot overcome the consequences of the lesser fault of the defendant's inattentive employees.

Because I am persuaded that Seaman Beckman, in all likelihood, would not have been killed had either party

acted with greater concern for the risks which he encountered as he stepped in darkness from one level to another on a wet and dangerous dock, I am equally persuaded that apportionment between the parties in this case is most likely to encourage greater attention to obvious risks in the future. This, in turn, should, hopefully, fulfill the basic purpose of litigation such as this, which is to reduce the danger to men employed in a hazardous occupation.

The fact remains that Captain Scott was in charge, and it was he who should have foreseen the danger and acted, either by commanding his own men, seeking assistance from the defendant's employees, or declining to dock. In view of that consideration, I conclude that the plaintiff is entitled to partial contribution in the amount of twenty-five percent of the loss incurred by it when it settled the claim brought by Beckman's estate.

It is, therefore,

ORDERED THAT plaintiff's motion to amend judgment be, and the same hereby is granted; and it is

FURTHER ORDERED THAT judgment be entered in favor of the plaintiff and against the defendant in the amount of $12,500.

The Clerk shall prepare an entry of judgment accordingly.

So ordered.

/s/ _____
United States Magistrate

Supreme Court, U.S.
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CLERK

No. 86-33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CSX CORPORATION (Formerly Chessie System, Inc.),
Petitioner,

v.

OGLEBAY NORTON COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

Petitioner Chesapeake & Ohio Railway Company provides the following information pursuant to United States Supreme Court Rule 28(1):

The Chesapeake & Ohio Railway Company (the C&O), the proper defendant in this action, is a wholly owned subsidiary of CSX Corporation (CSX), the named defendant herein. Subsidiaries and affiliates of CSX and the C&O, other than those wholly owned by them, are as follows:

1. CSA Acquisition Corporation, a wholly owned subsidiary of CSX, has a partial interest in Sea-Land Corporation.
2. CSX Resources, Inc., a wholly owned subsidiary of CSX, has partial interests in:
   a. Eastern Hardwoods, Inc.
   b. Mid-Allegheny Corporation. Mid-Allegheny has an interest in New Gauley Coal Corp., which in turn has an interest in Littleton Fuel Company.
3. The C&O has a substantial interest in the Baltimore and Ohio Railway Company, which in turn has a partial interest in the following:
   a. Allegheny and Western Railway Company;
   b. The Baltimore and Philadelphia Railroad Company;
   c. Clearfield and Mahoning Railway Company;
   d. Dayton and Michigan Railroad Company;
   e. Dayton and Union Railroad Company;
   f. The Home Avenue Railroad Company;
   g. The Cleveland Terminals & Valley Railroad Company.
4. Western Maryland Railway Company, a wholly owned subsidiary of the C&O, has a partial interest in the Baltimore and Cumberland Valley Railroad Extension Company.
5. CSX and various of its wholly owned subsidiaries have a partial interest in Fruit Growers Express Company.
6. CSX Transportation, Inc., a wholly owned subsidiary of CSX, has a partial interest in the following:
   a. Augusta and Summerville Railroad Company;
   b. Beaver Street Tower Company;

c. Central Transfer Railway and Storage Company;

d. Nashville & Decatur Railroad Company;

e. North Charleston Terminal Company;

f. Paducah & Illinois Railroad Company;

g. Winston-Salem Southbound Railway Company;

h. Woodstock & Blockton Railway Company.

7. Various subsidiaries of CSX have a partial interest in Richmond-Washington Company, which in turn has a partial interest in the Richmond, Fredericksburg and Potomac Railroad Company.

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No. 86-33 (3)

In the Supreme Court of the United States

October Term, 1986

CSX CORPORATION (formerly
Chessie Systems, Inc.),
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vs.

OGLEBAY NORTON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, as a result of a wharfinger's breach of its implied warranty of workmanlike service, a seaman fell to his death from a dangerous dock while assisting in mooring his vessel, did the Sixth Circuit correctly decide that the shipowner is entitled to be indemnified by the wharfinger, when the shipowner's conduct did not prevent or seriously hamper the wharfinger in the performance of its duties in accordance with its warranty of workmanlike service?

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No. 86-33

In the Supreme Court of the United States

October Term, 1986

CSX CORPORATION (formerly
Chessie Systems, Inc.),
Petitioner,

vs.

OGLEBAY NORTON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Oglebay Norton Company ("Oglebay Norton")[1] brought this admiralty action, as owner of the steamer Sylvania, to recover indemnity or contribution from Chesapeake & Ohio Railway Company ("C&O") for expenses incurred in settling the wrongful death claim of the estate of Ralph Beckman, a seaman aboard the Sylvania who was crushed to death when he fell from C&O's dock while attempting to attach a mooring cable to the dock.

1. Oglebay Norton Company is a publicly traded corporation with no parent company.

The operative facts giving rise to the claim for indemnity are contained in the opinion of the court of appeals below, 788 F.2d 361; Appendix to Petition for Certiorari at 1-14; as supplemented herein with additional detail from the trial record.

On the afternoon of April 4, 1980, the steamer Sylvania, a 572-feet self-unloading bulk carrier owned by Oglebay Norton, departed from Monroe, Michigan, toward the C&O docks in Oregon, Ohio, to load a cargo of coal. The Sylvania had received instructions by radio from C&O to moor at the No. 3 coal dock. While the Sylvania was enroute, a storm passed through the Toledo-Oregon, Ohio region shortly before 5:00 p.m. and caused a power outage at the C&O docks. Attempts by the Sylvania to contact C&O by radio after the storm were unsuccessful.

To reach the C&O docks, it was necessary for the Sylvania to proceed down the narrow Maumee Channel, a 500-feet wide channel outside of which the water was too shallow for the Sylvania to navigate. The Sylvania had been navigating the Maumee Channel for about one and one-half hours when it received instructions from C&O, via the Coast Guard, at about 7:30 p.m., to moor at the No. 2 coal dock rather than the No. 3 coal dock.

Shortly thereafter, Captain Scott on the Sylvania observed that there were no lights at the C&O docks, although the usual lights were present along the shore and at another nearby dock. The Sylvania entered the No. 2 coal dock slip at about 7:40 p.m. with all her lights on. Although it was dusk, it was not yet completely dark. The C&O's electricians had been unable to restore power to the dock, and the dock was not equipped with an emergency lighting system. Consequently, the only lights provided were the lights on the Sylvania.

The No. 2 coal dock has a two-tier concrete design. The upper tier is the main level of the dock. The lower tier, located at the outer edge of the dock, is only about three feet wide, and is approximately three feet below the upper tier. There are no ladders or hand rails between the two tiers. The mooring spiles are on the lower level, requiring a seaman to jump from the upper to the lower tier to moor the vessel. From the lower tier, the concrete dock drops straight down into the water. When a vessel docks, it is flush with the wall since the entire vertical face of the dock is smooth concrete. It is not equipped with fenders, pilings, or similar items to keep the vessel away from the wall, ladders to enable a person to climb out of the water, or recesses to enable a person to swim under the dock. A coal loading machine is located on the dock, and coal regularly would accumulate on the dock.

When the Sylvania docked, there was considerable coal spillage because the C&O employees had not swept the dock of coal, although the dock had about 20 crew members on hand who had not been occupied for almost two hours because of the power failure. Further, the dock and coal remained wet and slippery from the storm. Although the C&O dock superintendent anticipated that the Sylvania would moor under the existing conditions, C&O did not provide illumination for the vessel, despite the opportunity to do so and the availability of flashlights and car lights.

As the Sylvania pulled up to the dock, two seamen, one of whom was Ralph Beckman, were lowered by a landing chair, on the end of a boom, from the vessel to the upper tier of the dock. While Captain Scott did not request the assistance of the C&O dock hands, they observed the

mooring operation but did not volunteer assistance. Beckman was in charge of handling the forward mooring cables, one of which he carried along at the same speed as the slowly moving vessel for approximately 60 feet before he had to step to the lower level. He was not carrying a flashlight, but the vessel's floodlight had been lighting his way. However, as the vessel drew in closer to the dock, the lower level of the dock became darkened by a shadow cast by the curvature of the ship.

Beckman was directed by another deckhand on the vessel, Kevin Hosko, to attach the cable to a particular dock spile on the lower tier. Hosko testified that he and Beckman were able to see the spiles despite the shadow, and he was able to see Beckman's mouth move when Beckman spoke. As Beckman stepped to the lower level in an area littered with coal spillage, he slipped or tripped and fell into the water between the concrete dock face and the vessel. Hosko yelled a warning, but Captain Scott was unable to reverse the ship's motion toward the dock despite the use of the main engine, bow thruster, and the attempted use of safety blocks. Beckman was crushed between the vessel and the dock and was killed instantly.

Beckman's personal representative brought a wrongful death claim against Oglebay Norton under the Jones Act, 46 U.S.C. §688. Oglebay Norton tendered the defense of this claim to C&O, but C&O rejected the tender. The claim was settled for $50,000, and Oglebay Norton incurred $9,857.40 in attorneys' fees in the process. Thereafter, Oglebay Norton instituted this action against C&O to recover indemnity for a breach of the warranty of workmanlike service implicit in C&O's maritime contract to provide

services as a wharfinger,[2] or, in the alternative, to recover contribution.

By consent of the parties, the case was referred to a magistrate for trial, with direct appeal to the court of appeals. The magistrate found that an implied warranty of workmanlike service runs from a wharfinger to a shipowner, and that this warranty had been breached by C&O. The magistrate held, however, that indemnification was precluded because Captain Scott was negligent in failing to provide additional lighting or to anchor until lighting was furnished,[3] and because Scott was aware of the coal dock's dangers and was in a better position to avoid the injury than the wharfinger. The magistrate subsequently amended the judgment, pursuant to Fed. R. Civ. Proc.

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2. Oglebay Norton's claim for implied contractual indemnity is based upon this Court's line of maritime decisions which held that even in the absence of an express agreement of indemnity, a maritime contractor is obligated to indemnify a shipowner for damages caused by a breach of the contractor's implied warranty of workmanlike service. *See Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *See also Weyerhaeuser S.S. Co. v Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958); *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964). The warranty of workmanlike service also runs from a wharfinger or dockowner, to a shipowner. *E.g., Sims v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 556 (6th Cir. 1975); *Ammesmaki v. Interlake S.S. Co.*, 342 F.2d 627 (7th Cir. 1965).

3. In its brief on appeal, Oglebay Norton pointed out that the finding that the Sylvania could have anchored was clearly erroneous. The Sylvania's 572 feet length exceeded the 500 feet width of the channel. If she had attempted to anchor the Sylvania would have drifted at the end of a long anchor chain according to the forces of wind and current and grounded on the shallow margins of the channel. Furthermore, anchoring in the navigable channel is prohibited by the Coast Guard because the anchored vessel would block the channel to other vessel traffic. Brief of Appellant Oglebay Norton Company at pp. 31-33.

52(b), to award contribution to Oglebay Norton for 25 percent of the loss.[4]

The Sixth Circuit Court of Appeals reversed the magistrate's judgment which denied indemnity to Oglebay Norton. The court of appeals held that a shipowner is entitled to indemnity when a breach of the warranty of workmanlike performance results in loss, "absent conduct on its part sufficient to preclude recovery," citing *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567 (1958). In the Sixth Circuit, " 'conduct sufficient to preclude recovery' is conduct which 'prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty' of workmanlike service." 788 F.2d at 366; Appendix to Petition for Certiorari at 9. The court of appeals held that the magistrate erred by focusing on the relative fault of the parties rather than determining whether Captain Scott's conduct prevented or seriously hampered C&O from performing in a

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4. C&O places heavy emphasis on the magistrate's finding that Oglebay Norton was 75% to blame because Captain Scott "was in charge, and it was he who should have foreseen danger and acted," while C&O was held to be 25 percent at fault because its employees had not "lent a hand." However, C&O's reliance on this allocation is misplaced. As demonstrated in Oglebay Norton's brief on appeal, this allocation of fault was clearly erroneous because it was premised on the erroneous finding that the vessel should have anchored, *see* footnote 3, *supra*, and the allocation failed to take into account C&O's responsibility for the multiple hazards on the dock. Brief of Appellant Oglebay Norton Company at pp. 30-37. The court of appeals disapproved that allocation of fault in footnote 13 of its opinion:

> However, the magistrate's calculation of fault cannot be removed from his [erroneous] understanding of *Turner* [*v. Global Seas, Inc.*, 505 F.2d 751 (6th Cir. 1974)]. He calculated C&O's fault by its failure to offer aid to Captain Scott rather than the dangerous nature of the dock. Further, as previously noted, comparative fault has no meaning in an indemnity action.

788 F.2d at 367, n.13; Appendix to Petition for Certiorari at 12, n.13.

workmanlike manner, which converted the contract action into a tort action, contrary to this Court's decisions in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Weyerhaeuser*. There was no evidence that Captain Scott's conduct prevented C&O from sweeping the coal, providing emergency lighting or adding safety features to make the dock less dangerous,[5] and the court concluded that Oglebay Norton was entitled to indemnity.

REASONS WHY THE WRIT SHOULD BE DENIED

Several factors strongly suggest that this Court should deny the petition for a writ of certiorari. First, there is no conflict between the decision below and the rule prevailing in the other circuits as to the proper standard for determining "conduct sufficient to preclude recovery." Indeed, it is the unanimous view of the circuits that the proper standard for resolving this issue is whether the shipowner's conduct prevents or seriously hampers or handicaps the contractor in the workmanlike performance of its duty.

Second, the standard adopted by the various courts of appeals, including the court below, is the very standard identified by this Court for resolution of this issue in a maritime contract case.

Finally, the issue does not arise with sufficient frequency to warrant this Court's review. The case below,

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5. Three other seamen had been crushed in a similar fashion at C&O's docks on previous occasions, and the C&O docks are the only known docks on the Great Lakes that fail to provide any safety features to prevent a man in the water from being crushed.

decided April 14, 1986, is the first reported appellate decision to consider the issue of "conduct sufficient to preclude recovery" since 1979.

The foregoing factors, discussed in more detail below, amply demonstrate that issuance of a writ of certiorari is not appropriate in this case.

1. The Decision Below Does Not Conflict With Decisions of Other Federal Courts of Appeals.

With respect to a shipowner's right to indemnity based upon its contractual relationship with a stevedore, this Court has held:

> If in that regard [the stevedore] rendered a substandard performance which led to foreseeable liability of [the shipowner], the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*

Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 567 (1958) (emphasis added).

The Sixth Circuit Court of Appeals in the decision below held that "conduct sufficient to preclude recovery" requires conduct by the shipowner which "prevented or seriously hampered" the contractor's performance of its duty in accordance with its warranty of workmanlike service. 788 F.2d at 366; Appendix to Petition for Certiorari at 9. The Sixth Circuit standard is substantially identical to the standards adopted in the six other circuits to consider the issue of what conduct by the shipowner is sufficient to preclude recovery.[6]

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6. The positions of the various circuits on the standard for determining "conduct sufficient to preclude recovery," together with citations, are outlined in the Appendix to this brief.

C&O represents in its petition that there is a "patent" and "sharp" conflict among the circuits as to the standard by which the courts determine shipowner conduct sufficient to preclude recovery. However, C&O supports this characterization with citations to only three decisions of the Second Circuit Court of Appeals and a smattering of district court decisions, primarily within the Second Circuit. A close examination of these and other decisions of the Second Circuit Court of Appeals reveals that the rule prevailing within the Second Circuit is in fact the "prevent or seriously handicap" standard applied in the decision below, and adopted in every other circuit to consider the issue.

In a line of cases prior to 1974, the Second Circuit firmly established the rule that in order to preclude recovery, the shipowner's fault "must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough." *E.g., Albanese v. N. V. Nederl. Amerik Stoomv. Maats,* 346 F.2d 481 (2d Cir.), *rev'd on other grounds,* 382 U.S. 283 (1965); *Mortensen v. A/S Glittre,* 348 F.2d 383 (2d Cir. 1965); *Hartnett v. Reiss S.S. Co.,* 421 F.2d 1011 (2d Cir.), *cert. denied* 400 U.S. 852 (1970).

In 1974 the Second Circuit decided *Hurdich v. Eastmount Shipping Corp.,* 503 F.2d 397 (2d Cir. 1974), cited by petitioner for the supposed adoption of a standard other than the prevailing "prevent or seriously handicap" standard. However, in the subsequent cases of *Henry v. A/S Ocean,* 512 F.2d 401 (2d Cir. 1975), and *Rodriguez v. Olaf Pedersen's Rederi A/S,* 527 F.2d 1282 (2d Cir. 1975), *cert. denied* 425 U.S. 951 (1976), the Second Circuit clearly applied the "prevent or seriously handicap" standard in affirming judgments awarding indemnity to shipowners.

In *Rodriguez*, the Second Circuit explained its holding in the *Hurdich* case. The appellant in *Rodriguez* contended, as C&O does here, that in *Hurdich* the court had adopted a new definition of conduct sufficient to preclude recovery. However, after reviewing prior cases, the court rejected that contention and distinguished *Hurdich* on its facts, because the injury there occurred to a seaman aboard ship in an area over which the shipowner had exclusive control, and the ship alone was capable of correcting the dangerous condition. 527 F.2d at 1285-1286. The court in *Rodriguez* observed that *Hurdich* had not been decided on the basis that the shipowner's fault was merely concurrent; rather, it was an intervening cause. The court concluded that *Hurdich* "does not explicitly disavow the earlier line of cases already discussed," and "we believe that we must still apply the 'prevent or hinder' standard." 527 F.2d at 1286. Thus, *Hurdich* does not stand for the proposition proposed by C&O.

The second case cited by C&O as purportedly creating a conflict among the circuits is *Lopez v. Oldendorf*, 545 F.2d 836 (2d Cir. 1976), *cert. denied* 431 U.S. 938 (1977). However, *Lopez* was decided by the district court as a contribution case, rather than a true indemnity case. 545 F.2d at 839. In reversing the award of contribution in favor of the shipowner, the court went on to suggest, in *obiter dictum*, that the shipowner was precluded from recovery of indemnity, citing the discredited *Hurdich* case and omitting any reference to the proper standard that had been reaffirmed recently in the *Henry* and *Rodriguez* cases. This *obiter dictum* is not sufficient to create a conflict among the circuits.

In a decision subsequent to *Lopez*, the court of appeals affirmed a judgment awarding indemnity to a shipowner

and once again confirmed that the proper standard to be applied in the Second Circuit is the "prevent or seriously handicap" standard. *Master Shipping Agency, Inc. v. M. S. Farida,* 571 F.2d 131, 133 (2d Cir. 1978). *Master Shipping* further eroded the precedential value of *Hurdich* upon which C&O relies.

The final decision proffered by C&O as evidence of a conflict among the circuits is *Doca v. Marina Mercante Nicaraguense, S.A.,* 634 F.2d 30 (2d Cir. 1980), *cert. denied* 451 U.S. 971 (1981). However, the indemnity dispute in *Doca* was decided on the ground that the stevedore had not breached its warranty of workmanlike service. 634 F.2d at 34. Thus, it was not necessary for the court to consider whether the shipowner's conduct was sufficient to preclude recovery. The court's reference, in *obiter dictum* to the previous *obiter dictum* in *Lopez* and to the discredited *Hurdich* case, with respect to conduct sufficient to preclude indemnity, does not rise to the level of establishing a conflict among the circuits.

The foregoing review of Second Circuit cases demonstrates that the last three decisions of that court to actually consider and apply the standard for determining "conduct sufficient to preclude recovery" as a basis for the decision have each applied the "prevent or seriously handicap" standard that prevails unanimously in the other circuits. *See Master Shipping Agency, Inc. v. M. S. Farida, supra; Rodriguez v. Olaf Pedersen's Rederi A/S, supra;* and *Henry v. A/S Ocean, supra.*

Finally, C&O provides a *confer* citation to *Smith & Kelly Co. v. S/S Concordia Tadj,* 718 F.2d 1022 (11th Cir. 1983), in its quest to manufacture a conflict among the circuits where none exists. This case declined to extend

Ryan indemnity in circumstances where a seaman was injured at sea as a result of shipboard conditions which accumulated over a period of approximately six months. Obviously, since the court was not applying *Ryan* indemnity, the decision has nothing to do with the standard for consideration of one of the elements of *Ryan* indemnity, and this decision provides no support to C&O's position.

The so-called "patent" and "sharp" conflict perceived by C&O between the decisions of the Second Circuit on the one hand, and the unanimous view expressed in the decision of the Sixth Circuit below on the other, is nothing more than an illusion, a phantom which vanishes upon close scrutiny. There simply is no conflict among the decisions of the circuits on the standard for determining shipowner conduct sufficient to preclude recovery. There is no basis for granting the petition for certiorari under Rule 17 of this Court's Rules, and the petition should be denied.

2. The "Prevent or Seriously Hamper" Standard Utilized by the Court of Appeals Is the Standard Identified by This Court for Use in a Contractual Indemnity Case.

This Court's decisions have made it quite clear that the shipowner's claim for breach of a contractor's implied warranty of workmanlike service sounds in contract, not tort. The *Ryan* decision is replete with references to the contractual nature of the action. *See* 350 U.S. at 130-134. Quotation of one such reference is adequate to illustrate the point:

> The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., supra, 350 U.S. at 134. *See also Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964) ("we deal here with a suit for indemnification based upon a maritime contract").

The Court in *Weyehaeuser,* mindful of the contractual nature of the indemnity action, provided ample direction to the lower courts to apply contractual principles in determining "conduct sufficient to preclude recovery." In footnote 6 of the *Weyerhaeuser* decision, 355 U.S. at 567, the Court cited CORBIN, CONTRACTS §§ 571, 947, 1264 and RESTATEMENT OF CONTRACTS §§ 295, 315, each of which refers to actions of one party to a contract which *prevent or hinder* the performance of the other party. *See Waterman S.S. Corp. v. David,* 353 F.2d 660, 665 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966). Moreover, in *Weyerhaeuser* the Court specifically cautioned against the use of tort principles in resolution of the contractual indemnity action. "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., supra,* 355 U.S. at 569, citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*

The "prevent or seriously hamper" standard utilized by the court of appeals below is precisely the contractual standard designated by this Court in *Weyerhaeuser* for determining conduct sufficient to preclude recovery. There is no justification in this case for granting a writ of certiorari to engage in mere routine appellate review of the court of appeals' application of the correct standard to the facts of this case, which is what C&O's petition asks this Court to do.

3. The Issue Does Not Arise With Sufficient Frequency to Warrant Review by This Court.

The case below, decided on April 14, 1986, is the first reported decision by a court of appeals to address the proper standard for determining shipowner "conduct sufficient to preclude recovery" since the February 20, 1979 decision of the Third Circuit in *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1979), *cert. denied* 444 U.S. 833 (1979).

Where an issue has arisen only once in the last eight years, that issue is not of such public importance as to warrant this Court's expenditure of its limited time and resources to review the matter. The case below is primarily of importance to the individual parties now before the Court.

The infrequency with which the issue of "conduct sufficient to preclude recovery" arises, particularly when coupled with the factor that the circuits are unanimous in their adoption of the contractual "prevent or seriously handicap" standard—the very standard suggested by this Court in footnote 6 in *Weyerhaeuser*—strongly suggests that a writ of certiorari is inappropriate in this case. The petition should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF POSITIONS AND AUTHORITIES, BY CIRCUIT, ON STANDARD FOR DETERMINING "CONDUCT SUFFICIENT TO PRECLUDE RECOVERY"

The positions of the various circuits on the standard for determining "conduct sufficient to preclude recovery," together with supporting authorities, are as follows:

First Circuit

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 989, 990 (1st Cir. 1978) (right to indemnification can be lost if shipowner "impeded or hindered" stevedore from performing in a workmanlike manner).

Second Circuit

E.g., Master Shipping Agency, Inc. v. M.S. Farida, 571 F.2d 131, 133 (2d Cir. 1978) (shipowner's conduct will preclude it from obtaining indemnity only where it "prevented or seriously handicapped the stevedore in his effort to perform his duties"); *Rodriguez v. Olaf Pedersen's Rederi A/S*, 527 F.2d 1282 (2d Cir. 1975), *cert. denied* 425 U.S. 951 (1976); *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975); *Albanese v. N. V. Nederl. Amerik Stoomv. Maats*, 346 F.2d 481 (2d Cir. 1965), *rev'd on other grounds*, 382 U.S. 283 (1965). Second Circuit cases are discussed in greater detail in the text of the brief in opposition at pp. 9-11.

Third Circuit

E.g., Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 968 (3d Cir. 1979), *cert. denied* 444 U.S. 833 (1979) (indemnity is not barred where owner's conduct did not "prevent or hinder" the contractor from completing a workmanlike performance); *Dobbins v. Crain Bros., Inc.*, 567 F.2d 559 (3d Cir. 1977); *Burris v. Global Bulk Carriers, Inc.*, 505 F.2d 1173 (3d Cir. 1974); *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., Inc.*, 444 F.2d 727 (3d Cir. 1971).

Fourth Circuit

Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193, 197 (4th Cir. 1967) (shipowner's conduct "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" to preclude recovery).

Fifth Circuit

E.g., LeBlanc v. Two-R Drilling Co., 527 F.2d 1316, 1321 (5th Cir. 1976) (the question is "whether conduct or circumstances of the condition for which Shipowner has a legal responsibility seriously impeded or prevented Contractor from performing the job in a safe and workmanlike manner"); *Brock v. Coral Drilling, Inc.*, 477 F.2d 211 (5th Cir. 1973); *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968); *Waterman S.S. Corp. v. David*, 353 F.2d 660 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966).

Sixth Circuit

Oglebay Norton Co. v. CSX Corp., 788 F.2d 361 (6th Cir. 1986) (conduct sufficient to preclude recovery is

" 'conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty' of workmanlike service"); *Turner v. Global Seas, Inc.*, 505 F.2d 751 (6th Cir. 1974).

Ninth Circuit

E.g., Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp., 590 F.2d 778, 783 (9th Cir. 1979) (if the shipowner's conduct does not " 'prevent or seriously handicap the stevedore' in doing a workmanlike job," the shipowner is not precluded from indemnification); *United States v. San Francisco Elevator Co.*, 512 F.2d 23 (9th Cir. 1975); *H & H Ship Service Co. v. Weyerhaeuser Line*, 382 F.2d 711 (9th Cir. 1967); *Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co.*, 372 F.2d 674 (9th Cir. 1967).